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(1)

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

SADRI KRASNIQI,

PETITIONER

VS.

DALLAS COUNTY CHILD PROTECTIVE SERVICES UNIT OF THE TEXAS DEPARTMENT OF HUMAN SERVICES,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE

COURT OF APPEALS FOR THE

FIFTH DISTRICT OF TEXAS AT DALLAS

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March 2, 1992

QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment entitles a parent to effective assistance of counsel on appeal from a judgment terminating his parental rights in his children.

2. Whether strict application of appellate timetables to a parent appealing a judgment terminating his parental rights in his children, which prevents a decision on the merits of his appeal, deprives him of due process of law as guaranteed by the Fourteenth Amendment.

LIST OF PARTIES

Sadri Krasniqi (Appellant in the Court of Appeals and Respondent in the trial court)

Sebhate Krasniqi (Appellant in the Court of Appeals and Respondent in the trial court)

Dallas County Child Protective Services Unit of the Texas Department of Human Services (Appellee in the Court of Appeals and Petitioner in the trial court)

Urtim Krasniqi (a child)

Ureme Limma Krasniqi (a child)

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No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

SADRI KRASNIQI,

PETITIONER

VS.

DALLAS COUNTY CHILD PROTECTIVE SERVICES UNIT OF THE TEXAS DEPARTMENT OF HUMAN SERVICES,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS AT DALLAS

The Petitioner, Sadri Krasniqi, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Fifth District of Texas at Dallas entered on May 7, 1991, in proceedings styled Sadri Krasniqi and Sebhate Krasniqi, Appellants, v. Dallas County Child Protective Services Unit of the Texas Department of Human Services, Appellee.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth District of Texas at Dallas is reported at 809 S.W.2d 927 and is reprinted in the Appendix hereto, p. 1a infra.

JURISDICTION

The State of Texas filed a petition in the 304th District Court, Dallas County, Texas seeking the termination of the parental rights of Petitioner and his wife in their two children. A jury trial was conducted. As a result of the findings of the jury, a judgment was entered terminating the parental rights of Petitioner and his wife. Petitioner and his wife appealed the judgment of termination to the Court of Appeals for the Fifth District of Texas at Dallas. The judgment of termination was affirmed by the Court of Appeals on May 7, 1991. Petitioner's motion for rehearing en banc was overruled on May 22, 1991. Petitioner timely filed his application for writ of error to the Texas Supreme Court which was denied on October 23, 1991. Petitioner's motion for rehearing of his application for writ of error was denied on December 4, 1991. The denial by the Supreme Court of Texas of the application for writ of error was not a decision on the merits of the case. The jurisdiction of this Court to review the judgment of the Court of Appeals for the Fifth District of Texas at Dallas is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment, United States Constitution: Section I. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Texas Rules of Appellate Procedure

Rule 53. The Statement of Facts on Appeal

(k) Duty of Appellant to File. It is the Appellant's duty to cause a statement of facts to be filed with the Clerk of the Court of Appeals.

Rule 54. Time to File Record.

(a) In Civil Cases--Ordinary Timetable. The transcript and statement of facts, if any, shall be filed in the appellate court within sixty days after the judgment is signed, or if a timely motion for new trial or to modify the judgment has been filed by any party, or if any party has timely filed a request for findings of fact and conclusions of law in a case tried without a jury, within one hundred twenty days after the judgment is signed. If a writ of error has been perfected to the court of appeals the record shall be filed within sixty days after perfection of the writ of error. Failure to file either the transcript or the statement of facts within such time shall not affect the jurisdiction of the court, but shall be ground for dismissing the appeal, affirming the judgment appealed from, disregarding materials filed, or applying

presumptions against the appellant, either on appeal or on the court's own motion, as the court shall determine. The court has authority to consider all timely filed transcripts and statements of facts, but shall have no authority to consider a late filed transcript or statement of facts, except as permitted by this rule.

(c) Extension of Time. An extension of time may be granted for late filing in a court of appeals of a transcript or statement of facts, if a motion reasonably explaining the need therefor is filed by appellant with the court of appeals not later than fifteen days after the last date for filing the record. Such motion shall also reasonably explain any delay in the request required by Rule 53(a).

Texas Family Code
§11.10 Guardian and Attorney Ad Litem

(d) In any suit brought by a governmental entity seeking termination of the parent-child relationship or to be named conservator of a child, the court shall appoint an attorney ad litem to represent the interests of the child as soon as practicable to insure adequate representation of the child's interest. In any suit in which termination of the parent-child relationship is sought, the court shall appoint an attorney ad litem to represent the interests of each indigent parent of the child who responds in opposition to the termination. If both parents of the child are indigent and oppose termination and the court finds that the interests of the parents are not in conflict, the court may appoint a single attorney ad litem to represent the interests of both parents.

§11.19 Appeal

(b) An appeal may be taken by any party to a suit affecting the parent-child relationship from an order, decree, or judgment:

(3) entered under Chapter 15 of this code terminating or refusing to terminate the parent-child relationship; or appointing a managing conservator;

STATEMENT OF THE CASE

Petitioner, Sadri Krasniqi and his wife Sabhete are ethnic Albanians of Yugoslavian nationality. Mr. Krasniqi is a naturalized citizen of the United States. Petitioner and his wife both have limited abilities to speak and understand the English language. They are the natural parents of Urtim Krasniqi, a male child born May 1, 1980, and Ureme Limma Krasniqi, a female child born August 24, 1984. On March 15, 1990, the Dallas County Child Protective Services Unit of the Texas Department of Human Services (hereinafter DHS) filed a petition to terminate the parental rights of Petitioner and his wife in regard to the aforesaid children, alleging that Petitioner and his wife knowingly allowed the children to remain in conditions or surroundings which endangered the children's physical or emotional well-being, §15.02(1)(D), Texas Family Code, and engaged in conduct or knowingly placed the children with persons who engaged in conduct which endangered the physical or emotional well-being of the children, §15.02(1)(E), Texas Family Code. Trial commenced on April 11, 1990, and a verdict was returned by the jury on April 13, 1990. On April 18, 1990, judgment was entered upon the jury's verdict terminating the parental rights of Petitioner and his wife. Petitioner and his wife were represented by the same attorney at trial. Petitioner and his wife filed a motion for new trial and then each hired new, separate counsel who filed amended motions for new trial. After a hearing, the amended motions for new trial were overruled and each parent duly perfected his and her appeals to the Court of Appeals for the Fifth District of Texas at Dallas.

Each parent timely complied with all steps in the appellate process except their attorneys inadvertently

failed to timely file the statement of facts[1] from the trial court. The transcript was duly filed on August 14, 1990, and the statements of facts was due to be filed on August 16, 1990. The original due date for Petitioner's brief in the Court of Appeals was September 13, 1990, which, upon his request was extended to October 4, 1990. Petitioner timely filed his brief in the Court of Appeals on October 4, 1990, and at the same time submitted the statement of facts for filing. The clerk received the statement of facts but declined to file it. On October 5, 1990, Petitioner filed his Motion To Extend Time And To Compel Clerk To File Statement Of Facts. Petitioner's wife filed a similar motion. In its response DHS stated that it had no objections to granting the Petitioner's motion to extend the time for filing the statement of facts. By order dated October 15, 1990, a panel of the Court of Appeals denied the motion to extend time to file the statement of facts citing Rule 54(c), Tex. R. App. P. Petitioner filed motions to reconsider and for rehearing requesting permission to file the statement of facts, which were denied by a panel of the Court of Appeals. The last order denying Petitioner's motion was dated November 30, 1990, and stated that "[a]ny further argument on the subject should be addressed in appellants' briefs on the merits of this appeal." Petitioner then filed a supplemental brief which contended, in his Supplemental Point Of Error Number One, that the Court of Appeals erroneously declined to allow the filing of the statement of facts. In the aforesaid motions and supplemental brief, Petitioner raised the issues presented by this petition, which were decided by the Court of Appeals.

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[1]The statement of facts is the typed transcription of the testimony and other proceedings at the trial.

A panel of the Court of Appeals heard oral argument, most of which was devoted to the issues of whether or not permission should be granted to file the statement of facts. In its opinion, delivered May 7, 1991, the Court of Appeals rejected Petitioner's arguments that the Court had erroneously declined to allow the untimely filing of the statement of facts. The Court of Appeals found that there was not a right to effective assistance of counsel on appeal from a judgment terminating parental rights. The Court of Appeals further found that in the appeal of a judgment terminating parental rights, that strict application of appellate timetables, which caused Petitioner to be deprived of a decision on the merits of his appeal, did not violate due process of law. As all of Petitioner's points of error on the merits on original submission alleged the legal or factual insufficiency of the evidence, ineffectiveness of trial counsel and the erroneous admission of evidence, the Court of Appeals found that the judgment of the trial court had to be affirmed because there was not a statement of facts before the court. In a concurring opinion, Chief Justice Enoch agreed with the reasoning and the judgment of the Court but found that Rule 54(c), Tex. R. App. P., which prohibits consideration of a late filed statement of facts is "manifestly unjust" (Concurring Opinion, Chief Justice Enoch, Appendix, p.14a).

On May 22, 1991, Petitioner filed a Motion For Rehearing En Banc in the Court of Appeals which was overruled on June 14, 1991, by the same panel that rendered the opinion on original submission. Petitioner filed an Application For a Writ of Error with the Texas Supreme Court on July 12, 1991. The Application for Writ of Error was denied on October 23, 1991 with a notation, "writ denied". Petitioner filed a motion for rehearing of his application for writ of error with the Texas Supreme Court. The motion was denied without comment or opinion on December 4, 1991.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS DECIDED IMPORTANT QUESTIONS OF CONSTITUTIONAL LAW REGARDING TERMINATION OF PARENTAL RIGHTS WHICH HAVE NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT.

1. Right To Effective Assistance of Counsel.

When the Court of Appeals initially declined to allow the late filing of the statement of facts, Petitioner's counsel filed motions with the Court and a supplemental brief which contended that Petitioner's counsel had been ineffective due to his failure to timely cause the statement of facts to be filed. Petitioner contended that the Due Process Clause of the Fourteenth Amendment entitled him to effective assistance of counsel in his termination proceeding, and on appeal therefrom. Petitioner's claim is grounded in his fundamental, constitutionally protected rights in his children. *Santosky v. Kramer*, 455 U.S. 743, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); *Lassiter v. Department of Social Services of Durham County*, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981); *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551 (1972). Petitioner contends that because there are constitutionally protected liberty interests at stake, and under the facts of this case, that the Due Process Clause of the Fourteenth Amendment entitles him to effective assistance of counsel on the appeal of a termination of parental rights action that has been brought by the State. Petitioner relies principally on *Lassiter* and on *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) (the Due Process Clause of the Fourteenth Amendment

entitles the defendant in a criminal case to effective assistance of counsel on appeal).

In rejecting Petitioner's argument, the Court of Appeals relied on its own case, *Howell v. Dallas County Child Welfare Unit*, 710 S.W.2d 729 (Tex. App.- Dallas 1986, writ ref'd n.r.e.) cert. denied, 481 U.S. 1018, 107 S.Ct. 1898, 95 L.Ed.2d 505 (1987), which declined to apply the holdings of *Evitts v. Lucey* to a termination of parental rights case. In this case, the Court of Appeals concluded that "the constitutional right to effective assistance of counsel in criminal actions does not extend to a civil proceeding involving the termination of parental rights", *Krasniqi v. Dallas County Child Protective Serv's*, supra at 932. The Court of Appeals appeared to misinterpret Petitioner's claim as a request to extend the right of effective assistance of counsel in a criminal action to a termination of parental rights case. Petitioner has never invoked the Sixth Amendment right to effective assistance of counsel in this case, but claims that the Due Process Clause of the Fourteenth Amendment, on its own, without reference to the Sixth Amendment, under certain circumstances, provides for effective assistance of counsel in a parental rights termination case. The Court of Appeals used the wrong analysis and in so doing, decided an important issue of federal law that has not been decided, but should be decided by this Court.

This Court has never directly addressed whether the Due Process Clause of the Fourteenth Amendment provides for a right to effective assistance of counsel in a termination of parental rights case, or on appeal in such a case, or under what circumstances such a right may exist. This Court has decided that the Due Process Clause of the Fourteenth Amendment may, under certain circumstances, require that counsel be appointed to represent an indigent parent in a termination of parental rights case brought by the State. *Lassiter*, supra. However, the Court of Appeals, without even citing

Lassiter, held that there was not a right to effective assistance of counsel in a parental rights termination case. That there may be a right to counsel at trial in a termination of parental rights case, but not a right to effective counsel, at trial or on appeal, is incongruous, illogical and in conflict with other decisions of this court. *Lassiter*, supra, *Evitts v. Lucey*, supra. It would be helpful to litigants, the bench and bar to resolve this apparent inconsistency. The Petitioner respectfully submits that the Court of Appeals has employed the wrong analysis and reached the wrong result on an important issue of constitutional law that this Court should decide.

2. Strict Application of Appellate Timetables.

Petitioner further contended that strict application to him of the time limits for filing the statement of facts violated his right to due process of law by depriving him of his constitutional right to have the merits of his appeal heard. Petitioner's counsel did not timely file the statement of facts, but the late filing did not disadvantage the Appellee nor retard the appellate process. (See concurring opinion of Chief Justice Enoch in the Appendix.) As all of Petitioner's points of error on appeal required reference to and support from the statement of facts, the Court of Appeals was unable to address the merits of the appeal. Under state law, without the statement of facts, a reviewing court must presume that there is evidence to support the findings of fact and the trial court's judgment. Therefore, an appeal on an evidentiary matter without a statement of facts presents nothing for review and must be affirmed. *Archer v. Wood*, 771 S.W.2d 631, 632 (Tex. App. - Dallas 1989, no writ); *Mays v. Pierce*, 281 S.W. 2d 79, 82 (Tex. 1955). Petitioner relied on *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780 (1971) and *Little v. Streater*, 452 U.S. 1, 101 S.Ct. 2202, 68 L.Ed.2d 627 (1981), which held that a statute or rule may be constitutionally invalid as applied when it operates to deprive an individual of a protected

right even though it is generally a legitimate exercise of State power. In this case, the Petitioner was deprived of his right to a meaningful hearing on the merits of his appeal.[2]

The Court of Appeals' opinion stated that it recognized that all individuals must be afforded a meaningful opportunity to be heard but held that the failure of a litigant to comply with a rule of appellate procedure does not result in a denial of a meaningful opportunity to be heard and, hence, due process of law. This Court has never decided whether strict application of appellate timetables to an appellant in a termination of parental rights suit can deprive the appellant of due process of law where the strict application of such time limits does not disadvantage the other side or impair the progress of the appeal, but deprives the appellant of consideration by the Court of Appeals of the merits of his appeal.

Suits to terminate parental rights have become legal hybrids. Such suits employ the intermediate burden of proof of clear and convincing evidence and affect rights that are considered fundamental and constitutionally protected, but which are considered less important than the rights to life and liberty at stake in criminal cases. *Lassiter*, supra. Failure of defense counsel in a criminal case to meet an appellate deadline is ineffective assistance of counsel, entitling the defendant to have the error remedied. To most parents, their children are more important than the parent's own liberty or life. Yet due

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[2] §11.19(b)(3), Texas Family Code, provides for an appeal from a judgment terminating a parent-child relationship. This is an appeal as of right to the first tier of appellate review in the State's court system. This Court has held that once a state provides for a right to appeal, then the appellate procedures are subject to the Due Process Clause. *Evitts v. Lucey*, supra at 469 U.S. 400-402, 105 S.Ct. at 838-39.

to the "civil" label placed on termination cases, the Court of Appeals is treating this case as it would a suit on a note or a negligence case. It is treating Petitioner's fundamental rights in his children as it would a mere claim for money. This Court has recognized the importance of the parent-child relationship by requiring a greater quantum of evidence to terminate that relationship and recognizing a right to counsel, under the proper circumstances. This court should further define the legal standards that apply to the parent-child relationship in a way that recognizes and protects this fundamental human right. Petitioner respectfully submits that this is an important issue of constitutional law which should be decided by this Court.

II.

THE COURT OF APPEALS DECIDED SIGNIFICANT CONSTITUTIONAL ISSUES IN WAYS THAT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

While the Court of Appeals has decided issues of constitutional significance that have not been directly decided by this Court, it has also managed to make those decisions in ways that conflict with related decisions of this Court. Petitioner contends that the failure of the Court of Appeals to allow the filing and consideration of the statement of facts deprives him of due process of law as guaranteed by the Fourteenth Amendment because (1) it deprives him of effective assistance of counsel in an action brought by the State, that affects fundamental liberty interests, and (2) it deprives him of a meaningful opportunity to be heard on the merits of his appeal. Where a litigant's physical liberty is not at stake, this Court, in a series of decisions, has prescribed a three-element balancing test for determining Fourteenth

Amendment due process claims. Those elements are: the private interest at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions. *Lassiter*, supra, at 352 U.S. 27, 101 S.Ct. 2159; *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976); *Gagnon v. Scarpelli*, 411 U.S. 78, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). The Court of Appeals did not employ the three-part balancing test prescribed by this Court in deciding Petitioner's due process claim. In fact, the Court of Appeals did not discuss or even cite any of the foregoing cases. The Court of Appeals' opinion is therefore contrary to the applicable decisions of this Court that prescribe how a Court is to analyze and determine a claim based on the Due Process Clause of the Fourteenth Amendment.

1. Right to Effective Assistance of Counsel.

In *Lassiter*, supra, the Petitioner's parental rights to her children were terminated at the trial court by action of the State of North Carolina. Lassiter appealed her case to this court contending that "because she is indigent, the Due Process Clause of the Fourteenth Amendment entitled her to assistance of counsel, and that the trial court had, therefore, erred in not requiring the State to provide counsel for her." *Id.* at 452 U.S. 24, 101 S.Ct. 2158. This Court "granted certiorari to consider Petitioner's claim under the Due Process Clause of the Fourteenth Amendment . . . ." *Id.* This Court found that application of the Due Process Clause requires discovery of "what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake." *Id.* From its precedents, this Court found that there is a "presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may deprived of his physical liberty. It is against this presumption that all the other elements in the due process decision must

be measured." *Id.* at 452 U.S. 26-27, 101 S.Ct. 2159. This Court held that the other elements in the due process decision were those set forth in *Mathews v. Eldridge,* supra, that is "the private interests at stake, the government's interests and the risk that the procedures used will lead to erroneous decisions." *Id.* The Court of Appeals opinion is therefore in conflict with *Lassiter* and *Mathews v. Eldridge* by its failure to employ the analysis prescribed by this Court in evaluating due process claims.

Tex. R. App. P. 53(k) provides that it is an appellant's duty to cause a statement of facts to be filed with the Clerk of the Court of Appeals. It is the duty of appellant's counsel to see that the statement of facts is filed or that an extension of time for filing is acquired. *Entsminger v. Iowa*, 386 U.S. 748, 87 S.Ct. 1402, 18 L.Ed.2d 501 (1967); *Ward v. State*, 740 S.W.2d 794, 800 (Tex. Crim. App. 1987); *Ex parte Shields*, 550 S.W.2d 670, 677 (Tex. Crim. App. 1977). As review of the statement of facts is essential to a decision on the merits of Petitioner's appeal, the failure of Petitioner's counsel to cause the statement of facts to be timely filed is ineffective assistance of counsel. *Entsminger*, supra; *Ward*, supra; *Ex parte Shields*, supra.

It is well settled that the involuntary termination of parental rights involves fundamental constitutional interests. *Santosky v. Kramer*, supra; *Stanley v. Illinois*, supra. These fundamental liberty interests are rooted in the Due Process Clause of the Fourteenth Amendment. *Lassiter*, supra; *Board of Regents v. Roth*, 408 U.S. 564, 570-71, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972). The United States Court of Appeals for the Fifth Circuit has held that due process includes the right to counsel where a parent's rights in a child are at stake. *Davis v. Page*, 645 F2d 599 (5th Cir. 1981, en banc) cert. granted, *judgment vacated on other grounds*, 458 U.S. 1118, 102 U.S. 3504, 73 L.Ed.2d 1380 (1982). The State of Texas has recognized the fundamental right to counsel in a

termination proceeding by providing for appointment of counsel for an indigent parent who opposes termination. §11.10(d) Tex. Fam. Code; *Odoms v. Batts*, 791 S.W.2d 677 (Tex. App. - San Antonio 1990). This Court has found that the right to counsel means the right to effective assistance of counsel. *Evitts v. Lucey*, 469 U.S. 387, 395, 105 S.Ct. 830, 835, 83 L.Ed.2d 821 (1985); *Cuyler v. Sullivan*, 446 U.S. 333, 344, 100 S.Ct. 1708, 1716, 64 L.Ed.2d 333 (1980). This Court has also held that the Due Process Clause of the Fourteenth Amendment guarantees the right to effective assistance of counsel on appeal in a criminal case. *Evitts v. Lucey*, supra, at 469 U.S. 396, 400-405, 105 S.Ct. 836, 838- 841.

The Court of Appeals should have employed the three-element balancing test prescribed in *Lassiter* in determining whether or not the Due Process Clause of the Fourteenth Amendment entitled Petitioner to effective assistance of counsel in this case. As Petitioner's parental rights and interests in his children are fundamental and constitutional in nature, the interests in the accuracy and justice of a decision to terminate those parental rights is very compelling. *Lassiter*, supra, at 452 U.S. 28, 101 S.Ct. 2160. "Since the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision." Id. For this reason the State should share the parent's interest in having effective counsel. Further, the State has no pecuniary interest in a party having effective assistance of counsel, except to the extent that the State must then bear the expense of appointed counsel. Finally, the risk that Petitioner will suffer an erroneous deprivation of a fundamental right is great unless he has effective assistance of counsel. This case is a good example. The appellate process is many-faceted and complex. Failure to comply with any step can cause dismissal of the appeal or, as in this case, prevent the Court of Appeals from reviewing the merits of the appeal. The inability of the Court of Appeals to decide the merits

of Petitioner's appeal without a statement of facts certainly creates a significant risk that an erroneous decision will not be corrected. Therefore, when balancing the three factors, none weigh against a right to effective counsel for Petitioner in this case and all weigh in favor of finding that a right to effective assistance of counsel in the appeal of this case. Accordingly, the Court of Appeals erred by failing to apply the analysis in *Lassiter* to Petitioner's due process claim, and by failing to find that he was entitled to effective assistance of counsel on appeal in this case.

Once it is decided that Petitioner is entitled to effective assistance of counsel in his case, *Evitts v. Lucey* is substantial authority in support of Petitioner's claim that he did not receive effective assistance of counsel. *Evitts v. Lucey* is virtually identical to this case, except that *Evitts* was a criminal case. In *Evitts*, this Court held that the failure of appellant's counsel to comply with a technical rule of appellate procedure, which caused dismissal of the appeal, deprived the appellant of effective assistance of counsel. The Court of Appeal rejected *Evitts* as authority for a claim of ineffective assistance of counsel because it was a criminal case. Petitioner respectfully contends that the Court of Appeals erred by failing to realize that the decision in *Evitts* is based on the Due Process Clause of the Fourteenth Amendment, not on the Sixth Amendment right to counsel. *Evitts v. Lucy*, supra, at 469 U.S. 391, 105 S.Ct. 833; *Lucey v. Cavanaugh*, 724 F2d 560 (6th Cir. 1984). *Evitts* stands for the proposition that where there is a constitutional right to counsel, then the Due Process Clause of the Fourteenth Amendment requires that counsel be effective and that the right to effective counsel extend to a first appeal as of right. *Evitts v. Lucey*, supra, 469 U.S. 391-92, 396, 105 S.Ct. 833, 836. The Court of Appeals' opinion in this case is therefore also in conflict with this Court's opinion in *Evitts v. Lucey*, supra.

2. Strict Application of Appellate Timetables.

In *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780 (1971), the Petitioners were unable to file for divorce in Connecticut state courts because they were indigent and unable to pay the statutorily mandated filing fees. This Court ruled that depriving indigent citizens of access to the courts (and therefore a meaningful opportunity to be heard) was a violation of due process of law, holding that a "statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity is a measure enacted in the legitimate exercise of state power is beyond question." *Id.* at 401 U.S. 379, 91 S.Ct. 787. In *Little v. Streater*, 452 U.S. 1, 101 S.Ct. 2202, 69 L.Ed.2d 627 (1981), this court found that the failure of the State of Connecticut to pay for a putative father's blood test in a paternity case, when the alleged father cannot afford the testing, violated the Due Process Clause of the Fourteenth Amendment because it deprived the father of a meaningful opportunity to be heard. Each of the foregoing cases dealt with the fundamental human relationships of marriage and child-bearing. In each case, this court employed the three-element balancing test prescribed by *Mathews v. Eldridge*, supra, to determine whether or not the Petitioners were deprived of due process of law by the operation of state law that was legitimate on its face. In each case, this court found that, as applied to Petitioner, the operation of the Connecticut statutes deprived the Petitioners of due process of law.

In this case, the Petitioner was deprived of the opportunity to have the merits of his appeal considered by the Court of Appeals due to the operation of Rule 54, Tex. R. App. P. and the rulings of the Court of Appeals. Petitioner contended that because his fundamental constitutional rights in his children were at stake, that the operation of Rule 54 and the rulings of the Court of Appeals deprived him of due process of law. In response

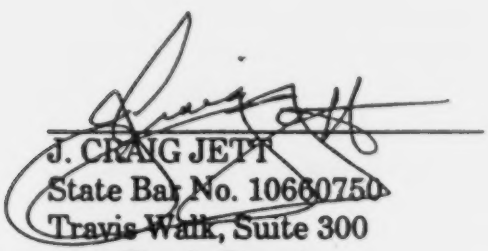
to Petitioner's Fourteenth Amendment claim, the Court of Appeals should have, but failed to, employ the three-part balancing test prescribed in *Mathews* and *Lassiter*. The Court of Appeals' opinion is therefore in conflict with this Court's decisions in *Boddie v. Connecticut*, supra, and *Little v. Streater*, supra.

This Court has held that the essence of due process of law is "fundamental fairness" and that application of the Due Process Clause requires discovery of "what 'fundamental fairness' consists of in a particular situation by first considering any relative precedents and then by assessing the several interests that are at stake". *Lassiter* at 452 U.S. 24-5, 101 S.Ct. 2158. In his concurring opinion, Court of Appeals Chief Justice Enoch stated that the prohibition by Rule 54(c) of considering a late filed statement of facts is "manifestly unjust". Chief Justice Enoch urged that the rule be changed. Is there any difference between that which is "fundamentally unfair" and that which is "manifestly unjust"? In his opinion, Chief Justice Enoch recognized that without a statement of facts before the Court of Appeals, that the "appeals process was illusory". Concurring Opinion, Appendix, p.14a. Chief Justice Enoch also discussed the purpose and effect of Rule 54 and found that while the purpose is laudatory, the benefit is "too small to even measure". If strict application of Rule 54 is "manifestly unjust", how is it not fundamentally unfair. If strict application of the time limits of Rule 54 to a party in a termination of parental rights suit is fundamentally unfair, how is it that such party is not deprived of due process of law? It appears that the Court of Appeals' concept of what constitutes due process of law is in conflict with the decisions of this Court. *Lassiter*, supra; *Boddie v. Connecticut*, supra; *Little v. Streater*, supra.

CONCLUSION

The Petitioner prays that, for all of the reasons stated above, that his petition for certiorari be granted. Petitioner further prays that upon consideration of his petition that this Court find that Petitioner was deprived of due process of law by the failure of the Court of Appeals to allow the filing and consideration of the statement of facts and that this Court enter an order requiring the Court of Appeals to allow the filing of the statement of facts and to reconsider the merits of Petitioner's appeal.

Respectfully submitted,



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APPENDIX

Affirmed and Opinion filed May 7, 1991

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-90-00965-CV

SADRI KRASNIQI AND SEBHATE KRASNIQI,

Appellants

V.

DALLAS COUNTY CHILD PROTECTIVE SERVICES UNIT OF THE TEXAS DEPARTMENT OF HUMAN SERVICES,

Appellee

On Appeal from the 304th Judicial District Court
Dallas County, Texas
Trial Court Cause No. 89-01244-W

OPINION

Before Chief Justice Enoch and Justices Whitham and Whittington

Opinion By Justice Whitham

The parent-appellants, Sadri Krasniqi and Sebhate Krasniqi, appeal from a judgment terminating the parent-child relationships between them and their two children, Urtim Krasniqi and Limma Krasniqi. The judgment followed the filing of a petition for termination of parental rights by the appellee, Dallas County Child Protective Services Unit of the Texas Department of Human Services, pursuant to the Texas Family code, section 15.02(1)(D) and (E) and 15.02(2). The jury found that each parent has knowingly placed or knowingly allowed the children to remain in conditions or surroundings which endanger the children's physical or emotional well-being and each parent has engaged in conduct and knowingly placed the children with persons who engaged in conduct which endangers the physical or emotional well-being of the children. See Tex. Fam. Code Ann. §15.02(1)(D) and (E) (Vernon Supp. 1991). The jury also found that termination of the parent-child relationship between each parent and the children is in the best interest of the children. See Tex. Fam. Code Ann. §15.02(2) (Vernon Supp. 1991). The initial points of error raise evidentiary matters only. We have no statement of facts. Accordingly, we affirm.

We have no statement of facts because of "time" constraints imposed by the Texas Rules of Appellate Procedure. The following chronology pertains to the "timeliness" issue before this court and to the orders of this court:

DATE	EVENT OR TRANSACTION
April 18, 1990	Trial court judgment signed.
April 26, 1990	Motion for New Trial filed in trial court.
July 5, 1990	Motion for New Trial overruled by trial court.

August 16, 1990	Record Due in Court of Appeals (Tex. R. App. P. 54(a)).
August 31, 1990	Last day for filing a motion to Extend Time for filing a Statement of Facts in the Court of Appeals (Tex. R. App. P. 54(c)).
September 11, 1990	Motion to Extend Time to File Brief in the Court of Appeals (Sebhate Krasniqi).
September 12, 1990	Motion to Extend Time to File Brief in Court of Appeals (Sadri Krasniqi).
September 17, 1990	Order granting September 12, 1990 Motion and allowing the filing of brief by October 4, 1990 (Sadri).
September 20, 1990	Order granting September 11, 1990 Motion and allowing the filing of brief by October 29, 1990 (Sebhate).
October 4, 1990	Brief filed in Court of Appeals (Sadri).
October 4, 1990	Statement of Facts tendered to Court of Appeals.
October 5, 1990	Motion to Extend Time and Motion to compel Clerk of the Court of Appeals to file Statement of Facts filed (by both Sadri and Sebhate).

October 15, 1990	Court of Appeals' Order denying October 5, 1990 Motion to Extend and Compel and Order striking Statement of Facts (as to both Sadri and Sebhate).
October 24, 1990	Motion to Reconsider filed in Court of Appeals (Sebhate).
October 25, 1990	Motion to Reconsider filed in Court of Appeals (Sadri).
October 29, 1990	Court of Appeals' Order denying October 24, 1990 Motion to Reconsider (Sebhate).
October 29, 1990	Brief filed in Court of Appeals (Sebhate).
November 13, 1990	Second Motion to Reconsider (or Motion for Rehearing on Motion to Reconsider) filed in Court of Appeals (Sadri). (NOTE: Counsel for Sadri Krasniqi denominated this motion as "MOTION FOR REHEARING OF MOTION TO RECONSIDER APPELLANT'S MOTION TO EXTEND TIME AND COMPEL CLERK TO FILE STATEMENT OF FACTS, OR, ALTERNATIVELY, MOTION TO SUSPEND RULES OR FOR OUT OF TIME APPEAL." Counsel filed it on November 13, 1990. The Order on the original Motion to Reconsider filed on October 25, 1990 had

	not been acted upon as of November 13, 1990 (although the Order denying the original Motion shows to have been issued two days later). Thus, the Clerk of this court of Appeals apparently changed the caption of this motion to conform with the situation that existed on the date of filing.)
November 15, 1990	Court of Appeals' Order denying October 25, 1990 Motion to Reconsider (Sadri).
November 30, 1990	Court of Appeals' Order denying November 13, 1990 Motion (Sadri).

Therefore, we have no statement of facts because the parents did not timely file the statement of facts and did not timely move to extend time for filing the statement of facts. Consequently, the statement of facts tendered to this court was stricken. The parents concede that they did not timely file the statement of facts and did not timely move to extend time for filing the statement of facts. The parents, however in supplemental points of error contained in their respective supplemental briefs, contend that this court has erroneously declined to allow them to file the statement of facts. The parents' supplemental points of error advance three arguments to support their contentions.

State Law

First, the parents argue that there is state law authority for out-of-time filing of the statement of facts. The parents point to Rule 2(b) of the Texas Rules of

Appellate Procedure providing that "for good cause shown, a court of appeals . . . may suspend requirements and provisions of any rule in a particular case on application of a party or on its own motion and may order proceedings in accordance with its discretion." (emphasis that of the parents). Tex. R. App. P. 2(b). We quote the rule in its entirety, including its heading:

> (b) Suspension of Rules in Criminal Matters.
> Except as otherwise provided in these rules, in the interest of expediting a decision or for other good cause shown, a court of appeals or the Court of Criminal Appeals may suspend requirements and provisions of any rule in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction. Provided, however, that nothing in this rule shall be construed to allow any court to suspend requirements or provisions of the Code of Criminal Procedure.

(emphasis added by this court). We conclude that rule 2(b) pertains to criminal appeals only. We reach this conclusion because the body of the rule refers to "a court of appeals" and "the Court of Criminal Appeals," but not to the "Supreme Court." Further, the body of the rule refers to the "Code of Criminal Procedure." Thus, we reason that rule 2(b) has no application to civil appeals. It is undisputed that a termination of parental rights case, such as the present case, is a civil proceeding and not a criminal proceeding. In concluding that the language of rule 2(b) refers to criminal appeals only, we place no import to the heading of rule 2(b): Suspension of Rules in Criminal Matters." Hence, we do not reach the parents' argument that section 311.024 of the Code Construction Act applies and we must treat the rule's heading as not to

"limit or expand the meaning of the statute [rule]." Tex. Gov't Code Ann. §311.024 (Vernon 1988).

The parents, however, reach elsewhere within the Code Construction Act and insist that the language of section 311.021(3), "a just and reasonable result is intended," should be applied to the present case to mean that denial of the filing of the statement of facts would not be a just and reasonable result. See Tex. Gov't Code Ann. §311.021(3) (Vernon 1988). The parents assert the absence of a "just and reasonable result" constitutes a deprivation of due process rights afforded by the state and federal constitutions. We disagree for the following reasons. First, the parents rely on criminal cases only involving various time requirements. Again, we point out that the present case is a civil appeal, not a criminal appeal. Moreover, a civil proceeding, even one involving a higher degree of proof than that ordinarily required, is not to be treated as a criminal case with all the procedural requirements of a criminal hearing strictly applicable. *Howell v. Dallas County Child Welfare Unit*, 710 U.S. 1018 (1987). Second, due process and equal protection do not require that the procedural time limits for filing the statement of facts cannot be waived in a termination of parental rights case. See *Howell*, 710 S.W.2d at 734. Therefore, we conclude that the parents have suffered no violation of due process rights afforded by the state and federal constitutions. Hence, we find no merit in the parents' "State Law" argument.

Denial of Effective Assistance of Counsel

Second, the parents argue that the failure to file the statement of facts deprives them of effective assistance of counsel. The parents maintain that denial of an out-of-time filing of the statement of facts violates the due process clause of the Fourteenth Amendment because of the ineffectiveness of their counsel on appeal. The parents ground their argument on *Evitts v. Lucey*, 469

U.S. 387 (1985). In *Evitts*, the issue before the Supreme Court was "whether the state court's dismissal of the appeal, despite the ineffective assistance of respondent's counsel on appeal, violates the Due Process Clause of the Fourteenth Amendment." *Evitts*, 469 U.S. at 391-92. *Evitts* was a criminal case. As in the present case, "ineffective" in *Evitts* relates to an appellant's failure to timely file a required part of the appellate record. See *Evitts*, 469 U.S. at 389. Nevertheless, in *Howell*, we declined to extend the holding in *Evitts* to a termination of parental rights case such as the present case. See *Howell*, 710 S.W.2d at 735. Again, a civil proceeding, even one involving a higher degree of proof than that ordinarily required, is not to be treated as a criminal case with all the procedural requirements of a criminal hearing strictly applicable. See *Howell*, 710 S.W.2d at 735.

The parents would have us disregard *Howell* on the asserted basis "that our conclusion in *Howell* that *Evitts* was a Sixth Amendment case." The parents' underlying premise is wrong. Our opinion in *Howell* does not treat the issue as a Sixth Amendment case. Rather, Howell, states the issue in *Howell* to be whether "the action of [this court] in denying appellant a statement of facts in this cause on appeal deprives her of equal protection and due process of law under the Fourteenth Amendment of the United States Constitution." *Howell*, 710 S.W.2d at 733. The only mention made of the Sixth Amendment in *Howell* is in connection with *Howell's* rejection of *Evitts* as controlling since *Evitts* is a criminal case. Thus, we treat the present case as we did *Howell*; that is, as nothing other than an appellate argument that our requiring of compliance with state rules of appellate procedure in a civil proceeding somehow violates due process in a parental termination case. We rejected that approach in *Howell*. We again reject that argument in the present case. In reality, the present case is not one of "ineffective assistance of counsel" in the criminal law

concept. Indeed, the asserted "ineffective" counsel are still with us and prosecute this appeal. Thus, we reason that if counsel are "ineffective," the parents who tell us these retained counsel failed to timely file the statement of facts must still remain satisfied with the quality of their services. To use words from the father's supplemental brief we have a case of "inadvertent failure to file," perhaps, but "ineffective assistance of counsel" in a civil appeal, no.

We conclude, therefore, that our refusal to allow untimely filing of the statement of facts did not deny the parents due process even though the parents' counsel tell us at oral argument that they were ineffective counsel for failing to timely file the statement of facts. Hence, we find no merit in the parents' "violation of due process because of ineffective assistance of counsel" argument. Simply put, the constitutional right to effective assistance of counsel in criminal actions does not extend to a civil proceeding involving the termination of parental rights. *Posner v. Dallas County Child Welfare Unit*, 784 S.W.2d 585, 588 (Tex. App.-- Eastland 1990, writ denied).

Strict Application of Time Limits Violates
Due Process of Law

Lastly, the parents argue that strict application to them of the time limits regarding filing of the statement of facts deprives them of due process of law. The parents insist that they have a constitutional right to have the merits of this appeal heard. The parents maintain that it is well established that a statute or rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question. *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). We read the parents to argue that the "protected right" in question is the right to be heard on the merits in this appeal. We

recognize that a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause. *Boddie*, 401 U.S. at 379. We conclude, however, that in the present case the State of Texas afforded the parents a meaningful opportunity to be heard in this appeal. Here, the State of Texas afforded the parents 120 days to file their statement of facts plus 15 days beyond that to file a motion for an extension of time to file the statement of facts. The parents do not complain of those time periods or contend that they were in any way unable to meet those time requirements. Instead, we gather from the supplemental brief of the mother and the supplemental brief of the father that the statement of facts had been obtained and could have been filed within the time limit, but that the father's counsel "inadvertently" failed to timely file the statement of facts. We decline to hold that "inadvertent failure" on the part of litigants to comply with a rule of appellate procedure can result in state denial to an individual of a meaningful opportunity to be heard. It follows that the strict application of the time limits regarding filing of the statements of facts did not deprive the parents of due process of law. Hence, we find no merit in the parents' "strict application of time limits violates due process" argument.

Having found no merit in any of the parents' three arguments as to why this court erroneously declined to allow them to file the statements of facts, we overrule the mother's sole supplemental point of error contending that this court has erroneously declined to allow the mother to file the statement of facts, and we overrule the father's supplemental point of error contending that this court has erroneously declined to allow him to file the statement of facts. It must be recognized that the time limits prescribed by rule 54(c) [formerly rule 21(c) of the Texas Rules of Civil Procedure] accomplish an important purpose by fixing the date a judgment becomes final. *B. D. Click Co. v. Safari Drilling Corp.*, 638 S.W.2d 860, 862

(Tex. 1982). Valuable property and personal rights are fixed as of that time. If a record may be filed at any time after the cost bond is timely filed, a successful litigant will not know when the judgment becomes final. *B. D. Click Co.*, 638 S.W.2d at 862. Thus, the courts of appeals have no authority to consider a late filed 54(c) motion. *Trans-Continental Properties, Ltd. v. Taylor*, 717 S.W.2d 890, 891 (Tex. 1986). With this explanation, we turn to consider the consequences of the parents' appeal in the absence of a statement of acts.

Disposition of the Appeal in the Absence of a Statement of Facts

We have no statement of fact. All of the remaining points of error raised by both parents are evidentiary points of error. These points of error challenge the legal and factual sufficiency of the evidence to support jury findings, complain of the admission of certain testimony, challenge the constitutional sufficiency of the evidence to terminate parental rights and assert deprivation of effective assistance of trial counsel. An appeal on an evidentiary matter without a statement of facts presents nothing for review. *Archer v. Wood*, 771 S.W.2d 631,632 (Tex. App.--Dallas 1989, no writ). Absent a statement of facts, this court must presume that there is evidence to support findings of fact and the trial court's judgment. Archer, 771 S.W.2d at 632 (citing *Mays v. Pierce*, 154 Tex. 487, 493, 281 S.W.2d 79, 82 (1955)). Without a statement of facts, this court's review is limited generally to complaints concerning: 1) errors of law; 2) erroneous pleadings or rulings thereon; 3) an erroneous charge; 4) irreconcilable conflicts of jury findings; 5) summary judgment; and 6) fundamental error. *Archer*, 771 S.W.2d at 632. No such complaints are assigned as error in the present case. We overrule all points of error of both the mother and father.

We affirm the trial court's judgment.

Affirmed and Opinion filed May 7, 1991

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-90-00965-CV

SADRI KRASNIQI AND SEBHATE KRASNIQI,

Appellants

V.

DALLAS COUNTY CHILD PROTECTIVE SERVICES UNIT OF THE TEXAS DEPARTMENT OF HUMAN SERVICES,

Appellee

On Appeal from the 304th Judicial District Court
Dallas County, Texas
Trial Court Cause No. 89-01244-W

OPINION

Before Chief Justice Enoch and Justices Whitham and Whittington

Opinion By Chief Justice Enoch

Parents have lost their children forever. This result may be properly supported by the evidence and commanded by law. I hope so. For in spite of requests by both the parents and the State, we will not fully review the trial court's decision because the parents' lawyers failed to file the statement of facts on time. This willful refusal is not required by the Common Law nor by statute; it is required by a rule of procedure.[1] I agree with the majority that rule 2(b) and *Evitts* do not apply here.[2] I agree that application of 54(c) does not violate notions of due process of law. And, I agree that without a statement of facts, we must presume that the facts support the judgment. But, rule 54(c) which *Click* holds prohibits our consideration of a late filed statement of facts is manifestly unjust.[3] It must be changed.

Our jurisdiction to hear an appeal attaches when an appeal bond (or notice of appeal where appropriate) is timely filed in the trial court.[4] The appeal bond in this case was timely filed. This court has jurisdiction.

But, there is a catch. Rule 54(c) prevents us from considering the statement of facts if it is late, and if the motion to extend time to file is itself not timely filed.[5] However, we have neither lost jurisdiction nor have we

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[1]Tex. R. App. P. 54(c)

[2]*B.D. Click Co. v. Safari Drilling Corp.*, 638 S.W.2d 860 (Tex. 1982).

[3]*B.D. Click Co. v. Safari Drilling Corp.*, 638 S.W.2d 860 (Tex. 1982).

[4]Tex. R. App. P. 41

[5]*Trans-Continental Properties, Ltd. v. Taylor*, 717 S.W.2d 890, 891 (Tex. 1986).

been relieved of the duty to proceed with consideration of the merits of the appeal.[6] We must still await briefing of the issues by the parties; we must still hear argument if requested by the parties; we must still write an opinion expressing our reasons for our decision in the case. All of that happened in this case. Regardless, the appeals process was illusory.[7] In this case, the statement of facts was not filed in time and the motion to extend the time to file was tendered late, therefore, we could not review the evidence in the trial.

A rule such as rule 54(c) is promulgated to move appeals through the courts at an appropriate rate of speed. That is to say, encourage litigants to give due regard to time limits and permit the appellate court to dispose of the appeal under circumstances where litigants are less than prompt in meeting appellate deadlines. Thus, limited judicial resources are not wasted and the dispute is timely resolved. I do not argue with this premise. But the premise fails with rule 54(c); it does not save this Court any measurable, limited judicial resources nor does it necessarily provide a prompt resolution of the dispute. As a general proposition, attorneys know that a motion for extension to file the statement of facts must be filed within fifteen days after the original due date. Not a countable fraction of appeals do we dispose of because a lawyer failed to timely file an extension motion. As to those appeals which are disposed of due to a late-tendered statement of facts, nearly all foundered in the appellate sphere until the briefs were tendered because, regardless of whether we have a statement of facts before us, we must still review the transcript and consider all points of error not evidentiary based. I acknowledge that

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[6]Tex. R. App. P. 54(a); *B.D. Click Co.*, 638 S.W.2d at 861.

[7]See *Archer v. Wood*, 771 S.W.2d 632 (Tex.App.--Dallas 1989, no writ).

one reason given in *Click* for a non-discretionary application of rule 54(c)'s predecessor was the need for finality in judgments.[8] However, that statement is but the reason behind the proposition that appeals should be expeditious. I state again, whatever sureness this harsh rule gives to finality or time savings, it is too small to even measure.

I do not advocate abolition of rule 54(c). The purpose of appellate deadlines is to ensure a prompt resolution of the appeal. This inures to the benefit of the Court, the litigants, and the citizens of this State. However, a guiding principle of our appellate rules should be "to eliminate, insofar as practical, the requirements which sometimes resulted in disposition of appeals without consideration of the merits."[9] Specifically, the rules should not create unnecessary traps for the inattentive or unwary. An unnecessary trap is making some deadlines deadly and others deadly only if the court determines that this is the proper remedy for a recalcitrant litigant or attorney.[10] Under the discretionary rules such as rule 74(l), it is this Court's practice to notify an attorney who has missed a deadline that the appeal may be dismissed if no action is taken in a stated period of time (or if the appellee was the defaulting party, that the case would be submitted without consideration of the matters appellee wished to have brought forward). Arguably, it makes equally good sense that the appellate court have the opportunity to notify a defaulting appellant of the failure to timely file the statement of facts (or even the transcript if that had been the case here). Perhaps it

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[8] *Click*, 638 S.W.2d at 862.

[9] *Click*, 638 S.W.2d at 861.

[10] Compare Tex. R. App. P. 54(c) with Tex. R. App. P. 74(l), (n).

makes more sense. Unlike a brief which is under the sole control of the attorney, the transcript is prepared by the trial court clerk and the statement of facts is prepared by the court reporter, and consequently, the attorney who is the "responsible" party may, in fact, not know that the record has not been filed.

Exceptions to Rule 54(c) have been urged.[11] However, I do not advocate exceptions to this rule, its failure to allow appellate court discretion is equally damaging to litigants regardless of the nature of the case, and it, in fact, provides none of the benefit that it theoretically purports to give. I would change the rule so that appellate courts, subject to the showing of a reasonable explanation, have the discretion to allow the late filing of the record.

CRAIG TRIVELY ENOCH
CHIEF JUSTICE

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[11] See *E_____ T_____ J_____ v. State*, 766 S.W.2d 871, 872-74 (Tex. App.--Dallas 1989, no writ) (Kinkeade, J., dissenting).

Order issued June 14, 1991

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-90-00965-CV

SADRI KRASNIQI AND SEBHATE KRASNIQI,
Appellants

V.

DALLAS COUNTY CHILD PROTECTIVE SERVICES UNIT OF THE TEXAS DEPARTMENT OF HUMAN SERVICES,
Appellee

ORDER

Before Chief Justice Enoch and Justices Whitham and Whittington

The Motion for Rehearing En Banc filed by appellant, Sebhate Krasniqi, on May 21, 1991, is hereby OVERRULED.

Further, the Motion for Rehearing En Banc filed by appellant, Sadri Krasniqi, on May 22, 1991, is hereby OVERRULED.

WARREN WHITHAM
JUSTICE

THE SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

October 23, 1991

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RE: Case No. D-1331

Style: SADRI KRASNIQI AND SEBHATE KRASNIQI
v. DALLAS COUNTY CHILD PROTECTIVE SERVICES
UNIT OF TEXAS DEPARTMENT OF HUMAN
SERVICES

Dear Counsel:

Both applications for writ of error in the above referenced case were this day denied with the notation, Writ Denied. Application for writ of error on behalf of Sadri Krasniqi is denied, as corrected.

Sincerely,

John T. Adams, Clerk

by _____
Blanca Morin, Deputy

THE SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

December 4, 1991

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RE: Case No. D-1331

Style: SADRI KRASNIQI AND SEBHATE KRASNIQI
v. DALLAS COUNTY CHILD PROTECTIVE SERVICES
UNIT OF TEXAS DEPARTMENT OF HUMAN
SERVICES

Dear Counsel:

Today, the Supreme Court of Texas overruled both motions for rehearing in the above referenced application/s for writ of error.

Sincerely,

John T. Adams, Clerk

by _____
Blanca Morin, Deputy